

UNITED STATES OF AMERICA  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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ADELBERT HAROLD WARNER,

Petitioner,

Case No. 1:13-cv-458

v.

Honorable Robert J. Jonker

STATE OF MICHIGAN,

Respondent.

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**REPORT AND RECOMMENDATION**

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether “it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” Rule 4, RULES GOVERNING § 2254 CASES; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to “screen out” petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). The Court may *sua sponte* dismiss a habeas action as time-barred under 28 U.S.C. § 2244(d). *Day v. McDonough*, 547 U.S. 198, 209 (2006). After undertaking the review required by Rule 4, I conclude that the petition is barred by the one-year statute of limitations.

## **Discussion**

### **I. Factual Allegations**

Petitioner Adelbert Harold Warner presently is incarcerated at the United States Penitentiary in Marion, Illinois, where he is serving a federal prison sentence for child pornography. Petitioner also is serving a concurrent prison term, imposed by the Barry County Circuit Court on June 19, 2008, after Petitioner pleaded guilty to first-degree criminal sexual conduct of a person under 13 years of age, MICH. COMP. LAWS § 750.520b(1)(a). Petitioner challenges the state-court conviction.

Petitioner alleges that he did not seek appointment of appellate counsel until more than one year after his judgment of conviction was entered. Counsel was appointed on August 26, 2009, but, under MICH. CT. R. 7.205(F)(3), Petitioner could not file a direct appeal of his conviction because it was untimely. As a consequence, on July 7, 2010, Petitioner filed a motion for relief from judgment under MICH. CT. R. 6.502. In his motion, Petitioner alleged that he was denied the effective assistance of counsel when trial counsel failed to investigate the case, failed to communicate with Petitioner, and allowed substitute counsel to appear at the plea hearing. Petitioner also alleged that he was unable to enter a knowing, voluntary or intelligent plea because he suffered from severe depression and was experiencing psychological symptoms caused by a cessation of his psychotropic medications. In addition, Petitioner alleged that his confession to state police detectives was coerced.

In a summary decision issued August 10, 2010, the trial court denied the motion for lack of merit. The court denied reconsideration on August 23, 2010. Petitioner sought leave to appeal to the Michigan Court of Appeals, which denied leave to appeal on February 28, 2011, and

reconsideration on March 22, 2011. Petitioner filed an application for leave to appeal to the Michigan Supreme Court. The supreme court denied leave to appeal on December 28, 2011, and it denied reconsideration on April 23, 2012.

Petitioner filed the instant petition on April 23, 2013, raising the grounds presented in the state courts.

## II. Statute of Limitations

Petitioner's application is barred by the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1), which became effective on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act, PUB. L. No. 104-132, 110 STAT. 1214 (AEDPA). Prior to enactment of the AEDPA, there was no defined period of limitation for habeas actions.<sup>1</sup> Section 2244(d)(1) provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

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<sup>1</sup>Previously, the only time limit was provided in Rule 9 of the Rules Governing § 2254 Cases, which allows dismissal of a petition only under circumstances where the state has been prejudiced by the delay in filing.

28 U.S.C. § 2244(d)(1). The running of the statute of limitations is tolled when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2); *see also Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (limiting the tolling provision to only State, and not Federal, processes); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (defining “properly filed”).

In most cases, § 2244(d)(1)(A) provides the operative date from which the one-year limitations period is measured. Under that provision, the one-year limitations period runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). According to his habeas application, Petitioner was sentenced on June 19, 2008. He did not file a direct appeal of his conviction to either the Michigan Court of Appeals or the Michigan Supreme Court. Where a petitioner has failed to properly pursue an avenue of appellate review available to him, the time for seeking review at that level is counted under § 2244(d)(1)(A). *See* 28 U.S.C. § 2244(d)(1)(A) (time for filing a petition pursuant to § 2254 runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review.”) (emphasis added). Petitioner had one year, or until June 19, 2009, in which to file a delayed application for leave to appeal in the Michigan Court of Appeals. *See* MICH. CT. R. 7.205(F)(3). Because Petitioner failed to file a timely appeal to the Michigan Court of Appeals, his conviction became final when his time for seeking review in that court expired. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 655 (2012) (holding that, because the Supreme Court can review only judgments of a state’s highest court, where a petitioner fails to seek review in the state’s highest court, the judgment becomes final when the petitioner’s time expires for seeking state-court review).

Petitioner had one year from June 19, 2009, in which to file his habeas application. Petitioner filed on April 13, 2013. Obviously, he filed more than one year after the time for direct review expired. Thus, absent tolling, his habeas application is time-barred.

Although 28 U.S.C. § 2244(d)(2) provides that the one-year statute of limitations is tolled while a duly filed petition for state collateral review is pending, the tolling provision does not “revive” the limitations period (i.e., restart the clock); it can only serve to pause a clock that has not yet fully run. *Payton v. Brigano*, 256 F.3d 405, 408 (6th Cir. 2001). Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations. *Id.*; *McClelland v. Sherman*, 329 F.3d 490, 493 (6th Cir. 2003). Even where the post-conviction motion raises a claim of ineffective assistance of appellate counsel, the filing of the motion for relief from judgment does not revive the statute of limitations. See *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004) (citing *McClelland*, 329 F.3d at 490). Because Petitioner’s one-year period expired on June 19, 2010, his motion for relief from judgment filed on July 7, 2010, did not serve to revive the limitations period.

The one-year limitations period applicable to § 2254 is a statute of limitations subject to equitable tolling. See *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010); *Akrawi v. Booker*, 572 F.3d 252, 260 (6th Cir. 2009); *Keenan v. Bagley*, 400 F.3d 417, 420 (6th Cir. 2005). A petitioner bears the burden of showing that he is entitled to equitable tolling. See *Keenan*, 400 F.3d at 420; *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004). The Sixth Circuit repeatedly has cautioned that equitable tolling should be applied “sparingly” by this Court. See, e.g., *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749 (6th Cir. 2011); *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); *Sherwood v. Prelesnik*, 579 F.3d 581, 588 (6th Cir. 2009). A petitioner seeking equitable tolling of the habeas statute of limitations has the burden of establishing two elements: “(1) that he

has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Holland*, 130 S. Ct. at 2562 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *Lawrence*, 549 U.S. at 335; *Hall*, 662 F.3d at 750; *Akrawi*, 572 F.3d at 260.

Petitioner asserts that he was housed in federal prison following his conviction and did not have access to Michigan law. Because he had no access to state law, he claims that he did not understand what he needed to do to have appellate counsel appointed for him following his Michigan conviction. As a consequence, he did not seek appointment of appellate counsel until July 28, 2009, after the time had expired for filing a delayed application for relief from judgment. Arguably, Petitioner intends to suggest that his ignorance of Michigan appeals procedures amounts to the kind of extraordinary circumstance entitling him to equitable tolling. The fact that Petitioner is untrained in the law, was proceeding without a lawyer, or may have been unaware of the statute of limitations for a certain period does not warrant tolling. *See Allen*, 366 F.3d at 403-04; *see also Craig v. White*, 227 F. App’x 480, 482 (6th Cir. 2007); *Harvey v. Jones*, 179 F. App’x 294, 299-300 (6th Cir. 2006); *Martin v. Hurley*, 150 F. App’x 513, 516 (6th Cir. 2005); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999) (“[I]gnorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse [late] filing.”). Moreover, Petitioner apparently did nothing in the intervening thirteen months to determine how to appeal his conviction. He therefore fails to show the requisite diligence entitling him to equitable tolling. *See Holland*, 130 S. Ct. at 2562. Petitioner does not allege that he wrote the trial court or any other court about filing an appeal for over one year after his judgment of conviction was entered. Moreover, although counsel was appointed for him on August 26, 2009, Petitioner did not file a motion for relief from judgment until July 7, 2010, nearly a year later. In addition, after the Michigan Supreme Court denied his motion for

reconsideration on the denial of leave to appeal from the order denying relief from judgment, on April 23, 2012, Petitioner waited another full year before filing his habeas petition. For all of these reasons, Petitioner is not entitled to equitable tolling of the statute of limitations.

In *McQuiggin v. Perkins*, \_\_\_ S. Ct. \_\_\_, No. 12-126, 2013 WL 2300806, at \*7 (May 28, 2013), the Supreme Court held that a habeas petitioner who can show actual innocence under the rigorous standard of *Schlup v. Delo*, 513 U.S. 298 (1995), is excused from the procedural bar of the statute of limitations under the miscarriage-of-justice exception. In order to make a showing of actual innocence under *Schlup*, a Petitioner must present new evidence showing that ““it is more likely than not that no reasonable juror would have convicted [the petitioner].”” *McQuiggin*, 2013 WL 2300806, at \*9 (quoting *Schlup*, 513 U.S. at 329) (addressing actual innocence as an exception to procedural default). Because actual innocence provides an exception to the statute of limitations rather than a basis for equitable tolling, a petitioner who can make a showing of actual innocence need not demonstrate reasonable diligence in bringing his claim, though a court may consider the timing of the claim in determining the credibility of the evidence of actual innocence. *Id.* at \*\*11-12.

In the instant case, although Petitioner states that he was actually innocent at the time he entered his plea, he proffers no evidence of his innocence, much less evidence that makes it more likely than not that no reasonable jury would have convicted him, had he gone to trial. *Schlup*, 513 U.S. at 329. Because Petitioner has wholly failed to provide evidence of his actual innocence, he is not excused from the statute of limitations under 28 U.S.C. § 2244(d)(1). His habeas petition therefore is time-barred.

The Supreme Court has directed the District Court to give fair notice and an adequate opportunity to be heard before dismissal of a petition on statute of limitations grounds. *See Day*, 547 U.S. at 210. This report and recommendation shall therefore serve as notice that the District Court may dismiss Petitioner's application for habeas corpus relief as time-barred. The opportunity to file objections to this report and recommendation constitutes Petitioner's opportunity to be heard by the District Judge.

**Recommended Disposition**

For the foregoing reasons, I recommend that the habeas corpus petition be denied because it is barred by the one-year statute of limitations. I further recommend that a certificate of appealability be denied. *See Slack v. McDaniel*, 529 U.S. 473 (2000).

Entered: June 28, 2013

/s/ Hugh W. Brenneman, Jr.

Hugh W. Brenneman, Jr.

United States Magistrate Judge

**NOTICE TO PARTIES**

Any objections to this Report and Recommendation must be filed and served within 14 days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).